STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

MODESTO TEACHERS ASSOCIATION, CTA/NEA. Charging Party. v. MODESTO CITY SCHOOLS AND HIGH SCHOOL DISTRICT. Respondent.	)	Case No. S-CE-741 Request for Reconsideration PERB Decision No. 518 PERB Decision No. 518a June 20, 1986

Appearances: Kirsten L. Zerger for Modesto Teachers Association, CTA/NEA; Breon, Galgani, Godino & O'Donnell by Daniel R. Fritz for Modesto City Schools and High School District.

Before Hesse. Chairperson; Burt and Craib, Members.

DECISION

BURT, Member: The Modesto City Schools and High School District (District) requests reconsideration of Decision No. 518 issued on August 26, 1985 by the Public Employment Relations Board (PERB or Board). In that decision. PERB found that the District had violated section 3543.5(a). (b) and (c) of the Educational Employment Relations Act (EERA or Act)[1] by

---

lEERA is codified at Government Code section 3540 et seq. Unless otherwise indicated, all statutory references herein are to the Government Code.

Section 3543.5 provides in pertinent part:

> It shall be unlawful for a public school employer to:

failing to provide the Modesto Teachers Association. CTA/NEA (Association), with information relevant to the processing of two employee grievances.

PERB's remedial order, among other things, required the District to provide the information upon request by the Association, and to refrain from interposing any procedural objection such as timeliness or res judicata should the Association seek to reopen either matter. The District's Request for Reconsideration asks the Board to modify these provisions of the order with respect to one of the grievances.

Having duly considered the District's request, the Board hereby grants reconsideration and modifies its order with respect to the District's request that a time limit be established for the Association's right to reopen the Leonard Choate grievance. Consistent with the discussion below, the Board otherwise denies the Request for Reconsideration.

(a) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter.

(b) Deny to employee organizations rights guaranteed to them by this chapter.

(c) Refuse or fail to meet and negotiate in good faith with an exclusive representative.

BACKGROUND

The issue before the Board in Decision No. 518 was whether the District unlawfully failed to provide information relevant to the evaluation and pursuit of grievances by employees Patricia Gurney and Leonard Choate. In both matters, the District failed or refused to provide information requested by the Association at early stages of the parties' grievance procedure. The Gurney grievance, nonetheless, was eventually arbitrated and a decision denying it rendered prior to the time of the unfair practice hearing. At the time of the hearing, the Choate grievance was still pending after denial at the second step of the grievance procedure. In Decision No. 518, the Board, with Chairperson Hesse concurring, concluded that the requested information was relevant to the processing of both grievances, and that the District's refusal to provide the information violated section 3543.5(a), (b) and (c) of the EERA.

The District's Request for Reconsideration is directed at paragraph 2 of the Board's remedial order, which required it to:

> (a) Upon request by the Modesto Teachers Association, CTA/NEA, provide to the Association the requested information . . . regarding partial paid and personal necessity leave.
>
> (b) If the Modesto Teachers Association, CTA/NEA, seeks to reopen the grievances filed by Patricia Gurney and Leonard Choate, or seeks to reopen an arbitration proceeding concerning those grievances, refrain from interposing any procedural objection such as timeliness or res judicata to the reopening sought by the Association.

The District has submitted unsworn documents to demonstrate that it supplied the relevant information to the Association prior to the arbitration of the Choate grievance, which took place shortly after the ALJ issued his proposed decision in this case. It argues that this obviates the need for paragraph 2(b) of the Board's order, and asks that this paragraph be deleted.

The Association responds that the District did not supply it with all of the information encompassed by the Board's order and that, in any event, the District's claim is appropriately deferred to compliance proceedings under applicable Board precedent.

DISCUSSION

Section 32410(a) of PERB's Regulations[2] provides that:

> The grounds for requesting reconsideration are limited to claims that the decision of the Board itself contains prejudicial errors of fact, or newly discovered evidence or law which was not previously available and could not have been discovered with the exercise of reasonable diligence.

1. Newly Discovered Evidence

In Pittsburg Unified School District (1984) PERB Decision No. 318a. PERB held that the purpose of requesting reconsideration based on newly-discovered evidence is to permit

---

2PERB Regulations are codified at California Administrative Code, title 8. section 31001 et seg.

the Board to have access to evidence which was unavailable at the time of hearing and could affect the underlying determination that the respondent did or did not violate the Act. Pittsburg, supra, footnote 4.

However, reconsideration is not appropriate to determine whether, as a factual matter, the respondent has complied with the Board's order, in whole or in part. Rather, this issue should be left to a compliance hearing if one is necessary. Otherwise, the Board would have to resolve factual disputes based upon evidence which is neither part of the original case record nor subject to cross-examination. San Mateo City School District (1984) PERB Decision No. 375a.

This is consistent with the National Labor Relations Board's approach to reconsideration of its decisions. See Local 5125. United Brotherhood of Carpenters and Joiners of America (Grace Co.) (1979) 241 NLRB 1043. at footnote 1.

The District here fails to meet PERB's test for reconsideration based on newly-discovered evidence. It does not challenge the Board's finding of a violation, nor does it argue that the Board's remedy is not properly tailored to the violation found. See Grace Co., supra. Rather, it argues that it has complied with paragraph 2(a) of the Board's order, and that the event contemplated by paragraph 2(b) of the order--conduct of the Choate arbitration based on full disclosure of relevant information to the Association--has already taken place.

The District's motion here is comparable to the arguments made in San Mateo, supra, and Pittsburg, supra, in which respondents argued that PERB should rescind orders to restore the status quo ante in unilateral change cases because the parties had complied with the Board's orders to bargain and had reached collective agreements concerning the changes. As in those cases. PERB would have to resolve the factual question of alleged partial compliance with 2(a) of its order in order to grant the District's request to delete 2(b). This PERB cannot do based on the unsworn record before it.

The District's arguments are simply an elaborate manner of asserting that full compliance with the Board's order has already occurred. All of these issues can and should be resolved in compliance proceedings, subject to appeal to the Board under its newly-adopted compliance regulation.[3] (Section 32980 became effective November 9. 1985.)

3Regulation 32980 states:

> The General Counsel is responsible for determining that parties have complied with final Board orders. The General Counsel or his designate may conduct an inquiry, investigation, or hearing under Division 1. Chapter 3 of these regulations, concerning any compliance matter.
>
> (a) In each case in which a compliance investigation or hearing is conducted, a

2. Clarification of the Board's Order

If it is determined in compliance proceedings that the District must produce further information to comply with the Board's order, the Association may exercise its right to revive the Choate proceedings pursuant to paragraph 2(b) of the order. Thus, the District's arguments that that paragraph is ambiguous must be addressed.

PERB has held that reconsideration is justified where a remedy will not effectuate the purposes of the Act. San Mateo. supra; Pittsburg, supra. In essence, the District contends that an order permitting the Association an unlimited time to reopen the Choate grievance and permitting it to "retry" the Choate grievance before a new arbitrator will not effectuate the purposes of the Act.

a. The Time Limit

Both parties concur that a time limit on the Association's right to reopen the Choate grievance is appropriate. Since the arbitral process is favored in part because it allows for

---

written determination shall be served on the parties.

(b) A determination based on an investigation may be appealed to the Board itself pursuant to Division 1, Chapter 4. Article 2 of these regulations.

(c) A determination based on a hearing may be appealed to the Board itself pursuant to Division 1. Chapter 4, Article 1 of these regulations.

prompt resolution of disputes, a time limit is consistent with the purposes of the Act. The Board's order permitting reopening of the grievance serves the purpose of permitting the Association to base its decision whether to arbitrate the grievance on all the information to which it is entitled. Therefore, an appropriate time limit is one which allows the Association a reasonable period in which to evaluate any additional information produced by the District.

The District proposes a limit of 30 to 45 days from the date of PERB's final order in this case. Since the parties dispute whether the District has complied with the order to produce information, any time limit based on the date of the Board's final order must allow for resolution of this dispute in compliance proceedings and for production of additional information by the District. As noted above, the District has contended that production of this information will be time consuming. Thus. 30 to 45 days from the final order may well be too short a time for this purpose.

The Association proposed a limit of 60 days from the date of the District's compliance with PERB's order to produce information in the Choate grievance. Sixty days is an excessive period, given the limited nature and purpose of the information. The Association needs only to determine whether the information as to leaves denied sufficiently strengthens its disparate treatment theory as to warrant reopening the

grievance. Once the Association receives the information, it will hardly need 60 days to make this determination.

An order granting the Association 30 days from the date of the District's compliance with the order to produce information in which to reopen the grievance will achieve the Board's purposes in this matter.

b. Reopening of the Arbitration

The District asserts that the Board's order is ambiguous in that it could be read to permit the Association to file a new Choate grievance, leading to arbitration before a new arbitrator. It argues its proposed restriction on the Association's right to reopen the Choate matter will effectuate the purposes of the Act because it will meet the concerns which prompted the remedial award without unduly punishing the District, and will avoid instability in the collective bargaining relationship by giving the appropriate measure of finality to the decision of the mutually-selected arbitrator.

The District suggests that the issue is strictly an ambiguity in the Board's order which depends solely on the Board's intent. Under this approach, resolution of the ambiguity would not depend on the taking of additional evidence, and it could be resolved on a motion for reconsideration.[4] However, we have concluded that this

---

4see Alum Rock Union School District/Mt. Diablo Unified School District (1981) PERB Order No. Ad-115, in which respondents filed a motion to reopen a hearing for purposes of

aspect of the District's request is inseparable from the newly-discovered evidence attached to its pleadings, and that, under Pittsburg, supra, and San Mateo, supra, it is properly deferred to compliance. We reach this conclusion for the following reasons.

When the Board issued this order, it had before it the Choate grievance, which was pending after Step II of the parties' grievance procedure, and the Gurney grievance, in which arbitration had been completed. In this context, the Board ordered the District as to both cases to refrain from interposing procedural objections to the reopening of the grievances or. of an arbitration proceeding.[5] If the Board intended for the Association to have the option to reopen the Gurney grievance at either the grievance or arbitration stage, this same provision would logically apply to the Choate grievance. This would certainly be consistent with the underlying rationale of the Board's decision, that information must be provided in order to permit the Association to evaluate

---

taking additional evidence to clarify an ALJ's proposed order. PERB denied the motion on grounds that ambiguities in the order could be clarified by the Board in ruling on exceptions or, if the taking of additional evidence were required to resolve them, they could be resolved in compliance proceedings. Thus, the critical question under Alum Rock is whether resolution of an asserted ambiguity requires the taking of additional evidence.

5lt should be noted that the District did not argue in its exceptions to the ALJ's proposed decision that the Board's Order should require that the Gurney grievance be reopened before the arbitrator who had originally heard it.

and process grievances and to decide whether to arbitrate them. In order to restore the status quo ante in this case, it is appropriate to place the Association in the position it would have been in had the District provided the information when it was originally requested. The District took the risk that the Association would get this second bite at the apple when it went forward with the arbitration with full knowledge that the ALJ's proposed order, which was then on appeal to the Board, might be enforced in full.

Although its policy arguments logically apply equally to the Choate and Gurney grievances, the District apparently has no objection to settling in compliance proceedings whether the Association may file a new Gurney grievance or is required to reopen that matter before the same arbitrator. In effect, the District is asking the Board to give some weight to the Association's apparent choice to proceed to arbitration in the Choate matter even though the ALJ's order was still on appeal. The District's argument must be evaluated in light of evidence relevant to the Association's decision to proceed, which is all that distinguishes the Choate grievance from the Gurney grievance.

The District does not dispute that reopening the Choate proceedings at an appropriate stage is a proper remedy for its violation of the Act. Rather, it presents an argument as to what is the appropriate stage for reopening in light of events which occurred after the hearing in this case. Arguments that

subsequent events have affected the scope of compliance obligations are properly presented in compliance proceedings pursuant to section 32980. The fact that the factual issues may be complex and may involve questions related to broader issues of effectuation of the Act's purposes does not preclude deferring these matters to compliance proceedings, particularly since the Board now has in place Regulation section 32980. See NLRB v. Ironworkers. Local 433 (9th Cir. 1979) [101 LRRM 3119], at 3124, where the court notes an extensive list of cases in which complex factual determinations have been deferred to compliance proceedings.

NATURE OF THE VIOLATION

In her dissent. Chairperson Hesse discusses an issue not raised by any party to this proceeding, either in the underlying case, or as a request for reconsideration. Relying on minor differences of language between the National Labor Relations Act (NLRA) and the EERA, she would find that the refusal to produce information relevant to the processing of grievances during the term of an agreement should be a violation of 3543.5(a) and (b) and does not violate the duty to meet and negotiate in good faith.

In so finding, she relies on NLRB v. Acme Industrial Co. (1967) 385 U.S. 432 for the proposition that specific language peculiar to the NLRA dictates that the duty to bargain collectively continues beyond contract negotiations. Since

that language is not present in EERA, she reasons that the duty does not extend to labor-management relations during the life of the contract, and she would, therefore, find that the refusal to turn over information here was not a violation of the duty to meet and negotiate in good faith.

We believe the dissent misinterprets Acme, supra. The court there begins its discussion by acknowledging that:

> There can be no question of the general obligation of an employer to provide information that is needed by the bargaining representative for the proper performance of its duties. NLRB v. Truitt Manufacturing Co. (1956) 351 U.S. 149 [38 LRRM 2042]. Similarly, the duty to bargain unquestionably extends beyond the period of contract negotiations and applies to labor-management relations during the term of an agreement. NLRB v. C & C. Plywood (1967) 385 U.S. 421 [64 LRRM 2065]. NLRB V. F. W. Woolworth Co. (1956) 352 U.S. 938 [39 LRRM 2151]. The only real issue in this case, therefore, is whether the Board must await an arbitrator's determination of the relevancy of the requested information before it can enforce the union's statutory rights under section 8(a)(5).

The court went on to review various sections of the law defining collective bargaining in order to find that the Board was not deprived of its jurisdiction because of the existence of the arbitration procedure. The court did not find that the duty to bargain extended beyond the signing of the contract because of the language on which the dissent relies.

The Supreme Court's view that the duty to bargain is consistent with its earliest decisions interpreting the NLRA.

See NLRB V. Sands Mfg. Co. (1939) 806 U.S. 332 [4 LRRM 530]. It is also consistent with the court's understanding of collective bargaining as expressed in cases arising under other statutes. For example, in a somewhat different context the court explicitly stated that:

> Collective bargaining is a continuous process. Among other things, it involves day-to-day adjustments in the contract and other working rules, resolutions of new problems not covered by existing agreements, and the protection of employee rights already secured by contract. Conley v. Gibson (1957) 355 U.S. 41 [41 LRRM 2089].

Conley was decided under the Railway Labor Act, which is also devoid of the NLRA language upon which the dissent relies.

Collective bargaining could not be otherwise than ongoing. The Board previously made this point. In Jefferson School District (1980) PERB Decision No. 133. rev.den. (7/1/83) 1 Civil 50241. the Board stated:

> . . . It is well settled that administration of the contract is an essential part of the collective bargaining process . . . . Jefferson, supra, at p. 54.

The signing of a contract does not extinguish the duty to bargain, but rather memorializes the parties' agreement on matters about which they have negotiated. It may serve as a waiver of the duty to bargain, but the extent of the waiver is itself negotiated. The contract may not cover all matters within scope; new issues will often arise which were not contemplated by the parties to the agreement. Further, the

signing of the contract, and the agreement to be bound by its provisions, implies an ongoing role for the exclusive representative in assuring that its members, as well as the employer, live up to the bargain.

The entire statutory scheme of EERA is consistent with this result. Section 354O(h)[6] defines meeting and negotiating to include not only good-faith efforts to reach agreement, but also provision for the execution of a contract to incorporate the agreement of the parties, if requested by either party. Clearly, the statute contemplates not simply meeting and conferring to reach agreement, but an executed agreement whose terms bind the parties over an agreed-upon length of time. To us. there is no question that the parties' duty to negotiate does not simply end upon reaching agreement, because

---

[6]Section 3540(h) provides:

> (h) "Meeting and negotiating" means meeting, conferring, negotiating, and discussing by the exclusive representative and the public school employer in a good faith effort to reach agreement on matters within the scope of representation and the execution, if requested by either party, of a written document incorporating any agreements reached, which document shall, when accepted by the exclusive representative and the public school employer, become binding upon both parties and, notwithstanding Section 3543.7, shall not be subject to subdivision 2 of Section 1667 of the Civil Code. The agreement may be for a period of not to exceed three years.

section 3540(h) does more than focus only on that time when the parties strive to reach agreement.

For the reasons above, we believe that the duty to negotiate continues beyond the execution of the contract and include labor relations during the term of the contract. We, therefore, find that failure to provide information necessary and relevant to the processing of grievances was properly found to be a violation of section 3543.5(c) and, derivatively, of subsections (a) and (b).

ORDER

The Board hereby GRANTS reconsideration of its Decision in Modesto City Schools and High School District (1985) PERB Decision No. 518 for the limited purpose of clarifying its Order to provide that the Association may reopen the Leonard Choate matter pursuant to paragraph 2(b) of the Board's Order within 30 days of the Modesto City Schools and High School District's compliance with paragraph 2(a). In order to effectuate the purposes of the EERA, this codification will apply to the Patricia Gurney grievance as well.

The Order in this case is, therefore, modified to read as follows:

Upon the foregoing findings of fact and conclusions of law and the entire record in the case, it is hereby ORDERED that the Modesto City Schools and High School District and its representatives shall:

1. CEASE AND DESIST FROM:

(a) Failing and refusing to provide the Modesto Teachers Association. CTA/NEA, with all relevant information and documents needed by the Association to prosecute contract grievances on behalf of certificated employees of the District.

2. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS DESIGNED TO EFFECTUATE THE POLICIES OF THE ACT:

(a) Upon request by the Modesto Teachers Association. CTA/NEA, provide to the Association the requested information regarding art classes at Downey High School, and regarding partial paid and personal necessity leaves.

(b) If. within 30 days of full compliance by the District with the terms of paragraph 2(a) above, or within 30 days of the date of this Order, whichever is later, the Modesto Teachers Association, CTA/NEA, seeks to reopen the grievances filed by Patricia Gurney and Leonard Choate. or seeks to reopen an arbitration proceeding concerning those grievances, refrain from interposing any procedural objection such as timeliness or res judicata to the reopening sought by the Association. If the District claims that it substantially complied with paragraph (a) during the arbitration proceedings, and if it is determined in compliance proceedings that the District did so, there shall be no right to reopen.

(c) Within thirty-five (35) days following the date of service of this Decision, post at all work locations where notices to employees customarily are placed, copies of the

Notice attached as an Appendix hereto, signed by an authorized agent of the employer. Such posting shall be maintained for a period of thirty (30) consecutive workdays. Reasonable steps shall be taken to insure that this Notice is not reduced in size, defaced, altered or covered by any material.

(d) Written notification of the actions taken to comply with this Order shall be made to the Sacramento regional director of the Public Employment Relations Board in accordance with his instructions.

Member Craib joined in this Decision.

Chairperson Hesse's Concurrence and Dissent begins on page 19.

Hesse, Chairperson, concurring and dissenting: I concur with the majority ruling that a request for reconsideration is not the appropriate method for resolving whether the District has complied with the Board order in PERB Decision No. 518. If the parties cannot reach agreement on this and related issues, resolution must be accomplished through a compliance proceeding.

In the proceeding, the parties may introduce evidence and make arguments as to whether the District has substantially complied with the Board order. It is there that the parties can best resolve whether evidence regarding leaves denied, as opposed to granted, is necessary and relevant to the Choate grievance.

Nevertheless, I disagree with portions of the majority's decision. The majority defers to PERB's compliance procedure the policy decision of whether the Association may pursue the arbitrations before new arbitrators, or whether it is limited to reopening the record with the same arbitrators. It is highly inappropriate to assign this type of decision to a compliance officer. This is not the kind of issue in which an evidentiary hearing would be beneficial. When the original order was issued, the Board intended either to allow a completely new grievance and arbitration process, or to limit the parties to reopening the cases with the original arbitrators. I would find that the Board intended the parties to reopen the matters before the arbitrators that they previously chose for the resolution of these disputes.

Also, I am concerned by the Association's stance at the Choate arbitration. While the Board itself was deliberating on

exceptions taken to the decision of PERB's administrative law judge, the Association processed a grievance through arbitration. Prior to the arbitration, and at the arbitrator's request, the District produced information pertaining to requests for "personal necessity leave" and "partial paid leave," where those requests were granted. The District, however, did not produce records of those leave requests which were denied.[1]

Although this issue remained unresolved, the Association wanted to proceed with the arbitration, with the understanding that the arbitrator's award would be subject to vacation, and that the record would be subject to being reopened for the taking of additional evidence. The District, instead, wanted a continuance pending the outcome of the Board's decision in the case. The arbitrator denied the District's request, thus forcing it to litigate the Choate grievance as the Association wished. However, the District prevailed at the Choate arbitration. Now, instead of asking to reopen the record before Arbitrator Donald H. Wollett, the Association wants to process the Choate grievance and obtain a de novo hearing before a new arbitrator.

The Association has no basis, statutorily or contractually, to relitigate the Choate arbitration. Rather, it steadfastly maintained the right to present any new evidence (new to the old arbitrator) the District may be forced to provide. It is also apparent that the Association agreed to reopen the decision with

---

[1] The arbitrator ruled that the information need not be provided.

the same arbitrator, i.e., Arbitrator Wollett. Since I find that this was the Board's intent in the original order, I would limit the Association's right to reopening the record and processing the Choate arbitration before the same arbitrator.

I have reviewed the original charges[2] and now find that the ALJ and the Board erred in its Decision No. 518 finding of an EERA section 3543.5(c) violation in this case. I still concur with the decision on the finding that the District violated EERA by its failure to provide necessary and relevant information. But, I simply disagree with the finding of a 3543.5(c) violation. In reconsidering the facts in this case, I would hold that a finding of a violation of EERA section 3543.5(a) and (b) is warranted. In reaching this conclusion, I find the ALJ and the Board analysis and application of NLRA section 8(d) to EERA section 3540.l(h) to the facts of this case are inaccurate, and reliance on Stockton Unified School District (1980) PERB Decision No. 143, which also includes the NLRA section 8(d) comparison, is flawed.

The Board relied on Stockton and NLRB precedent for the proposition that an employer's failure to provide relevant and necessary information concerning two employee grievances is a refusal to bargain or violation of EERA section 3543.5(c). But reliance on Stockton is inappropriate, because this case and

---

[2]Where a serious error of law has occurred, the Board reviews original charges. (See El Dorado Union High School District (1986) PERB Decision No. 537a.)

Stockton are distinguishable on their facts.

In Stockton, the employer refused to provide health benefit information during mid-contract, reopener negotiations. In that factual context, the employer's failure to provide necessary and relevant information constituted a failure to meet and negotiate in good faith. The Stockton employer would not disclose information relevant to the Association's fulfillment of its duties as the bargaining representative of the employees in negotiations, and, thus, the Stockton Association was hampered in its duty to intelligently negotiate health benefits.

The instant case, by contrast, involves a request for information that was relevant and necessary to initiating and processing of two grievances through the negotiated grievance procedure.

Since this case involves contract administration, as distinct from contract negotiations, Stockton cannot be relied on for authority for finding a "(c)" violation in this case.

The Board extrapolates general similarities between NLRA section 8(d) and EERA section 3540.l(h) in order to adopt NLRB precedent to support the proposition that the failure to provide information relating to two grievances is a refusal to bargain.[3]

---

3 EERA section 3540.1(h) provides, in relevant part:

> "Meeting and negotiating" means meeting, conferring, negotiating, and discussing by the exclusive representative and the public

To reach this "unholy alliance," the Board found that section 3543.5(c) of the EERA is similar to section 8(a)(5) of the NLRA, which also prohibits an employer's refusal to bargain in good faith.[4] The Board then bootstrapped this similarity

---

> school employer in a good faith effort to reach agreement on matters within the scope of representation and the execution, if requested by either party, of a written document incorporating any agreements reached, which document shall, when accepted by the exclusive representative and the public school employer, become binding upon both parties and, notwithstanding Section 3543.7, shall not be subject to subdivision 2 of Section 1667 of the Civil Code. The agreement may be for a period of not to exceed three years.

NLRA section 8(d) states, in relevant part:

> For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party. (Emphasis added.)

[4]EERA section 3543.5 states, in pertinent part:

> It shall be unlawful for a public school employer to:
>
> . . . . . .
>
> (c) Refuse or fail to meet and negotiate in good faith with an exclusive representative,

NLRA section 8(a)(5) states, in relevant part:

to justify finding "similarities" between the very different section 3540.1(h) of the EERA and section 8(d) of the NLRA, both of which define the generalized duty of the parties to meet and negotiate.

But, one very important difference between EERA section 3540.l(h) and NLRA section 8(d) distinguishes these two sections. The duty to bargain collectively with respect to "any question arising thereunder" is not employed in EERA section 3540.l(h). In NLRB v. Acme Industrial Co. (1967) 385 U.S. 432, the U.S. Supreme Court found the phrase "any question arising thereunder" to mean that "to bargain collectively" extended beyond the period of contract negotiations and included labor-management relations during the term of the contract. Since the critical phrase on which the court bases its holding is not found in EERA section 3540.l(h), I am unwilling to read this into EERA section 3540.l(h) and thus into section 3543.5(c).

There is no doubt that by definition collective bargaining as a process relies on cooperation and an open exchange on a continuous basis.[5] But I do not interpret that covenant to

---

> It shall be an unfair labor practice for an employer—
>
> . . . . . .
>
> (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

[5]The majority misreads the dissent. The cases cited by

mandate equating NLRA section 8(d) to EERA section 3540.l(h).

Therefore, the District's unlawful refusal to provide information in this case was not a violation of EERA section 3543.5(c). The refusal to bargain violation and its traditional remedy simply do not fit the facts of this case. To what purpose should the District be ordered to "meet and negotiate" with the Association concerning the duty to produce information that this Board has deemed necessary and relevant to the Association's duties? Obviously to no purpose, as the majority, although finding a (c) violation, fails to remedy that violation. Therefore, even the majority must acknowlege that the wrong committed is not a failure to meet and negotiate. It is a failure to produce records which results in interference with association and employee rights, an EERA section 3543.5(a) and (b) violation.[6]

---

the majority do not respond to my concerns and are not controlling. Conley v. Gibson is a declaratory relief action brought by "negro" employees under the Railway Labor Act who sought to enforce their statutory right not to be treated unfairly and discriminated against by the union. In NLRB v. Sands, the court finds that the employer did not refuse to bargain and again relies on the interpretation of section 8(d). As noted infra, EERA does not have the same language as 8(d).

[6]EERA section 3543.5 states, in pertinent part:

> It shall be unlawful for a public school employer to:
>
> (a) Impose or threaten to impose reprisals on employees, to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of

Rather, I do find the District in the instant case unlawfully failed to provide necessary and relevant information that the Association requested. Such a failure is patently a violation of the Association's right to represent the members of the bargaining unit, i.e., a violation of EERA section 3543.5(a) and (b).

---

their exercise of rights guaranteed by this chapter.

(b) Deny to employee organizations rights guaranteed to them by this chapter.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD
An Agency of the State of California

After a hearing in Unfair Practice Case No. S-CE-741. Modesto Teachers Association. CTA/NEA v. Modesto City Schools and High School District, in which all parties had the right to participate, it has been found that the Modesto City Schools and High School District violated Government Code section 3543.5(a). (b) and (c).

As a result of this conduct, we have been ordered to post this Notice and will abide by the following. We will:

1. CEASE AND DESIST FROM:

(a) Failing and refusing to provide the Modesto Teachers Association, CTA/NEA, with all relevant information and documents needed by the Association to prosecute contract grievances on behalf of certificated employees of the District.

2. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS DESIGNED TO EFFECTUATE THE POLICIES OF THE ACT:

(a) Upon reguest by the Modesto Teachers Association, CTA/NEA, provide to the Association the reguested information regarding art classes at Downey High School, and regarding partial paid and personal necessity leaves.

(b) If. within 30 days of full compliance by the District with the terms of paragraph 2(a) above, or within 30 days of this Order, whichever is later, the Modesto Teachers Association, CTA/NEA, seeks to reopen the grievances filed by Particia Gurney and Leonard Choate, or seeks to reopen an arbitration proceeding concerning those grievances, the District will refrain from interposing any procedural objection such as timeliness or res judicata to the reopening sought by the Association.

Dated: _____ MODESTO CITY SCHOOLS AND HIGH SCHOOL DISTRICT

By: _____
Authorized Agent

THIS IS AN OFFICIAL NOTICE. IT MUST REMAIN POSTED FOR THIRTY (30) CONSECUTIVE WORKDAYS FROM THE DATA OF POSTING AND MUST NOT BE REDUCED IN SIZE. DEFACED. ALTERED OR COVERED WITH ANY OTHER MATERIAL.